SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-235

MARCO DE FUNIS, *et al.*,
Petitioners,

vs.

CHARLES ODEGAARD, *et al.*,
Respondents.

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AMICUS CURIAE.

ALEXANDER M. BICKEL,
261 St. Ronan Street,
New Haven, Connecticut 06511,

PHILIP B. KURLAND,
Two First National Plaza,
Chicago, Illinois 60670,
Attorneys for Amicus Curiae.

LARRY M. LAVINSKY,
300 Park Avenue,
New York, New York 10022,

ARNOLD FORSTER,
315 Lexington Avenue,
New York, New York 10016,
Of Counsel.

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OPINIONS BELOW.

The opinions of the Supreme Court of Washington are reported at 82 Wn. 2d 11, 507 P. 2d 1169, and are reprinted as Appendix A to the petitioner's Jurisdictional Statement or in the Alternative Petition for Certiorari.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3). Certiorari was granted on 19 November 1973.

CONSENT OF THE PARTIES.

Both petitioners and respondents have graciously consented to the delayed filing of this brief, and their letters of consent are on file with the Clerk of this Court.

QUESTIONS PRESENTED.

The questions presented in this case are two:

1. May a State establish racial quotas for the admission of students to its law school?

2. May a State, which cannot constitutionally discriminate on racial grounds against black applicants to its law school, constitutionally discriminate on racial grounds against white applicants to its law school?

CONSTITUTIONAL PROVISION.

The Fourteenth Amendment to the Constitution of the United States provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

INTEREST OF THE AMICUS CURIAE.

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of B'nai B'rith to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States.

Among its many other activities directed to these ends, the Anti-Defamation League has in the past filed *amicus* briefs in this Court urging the unconstitutionality or illegality of racially discriminatory laws and practices in such cases as, *e.g.*, *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Sweatt* v. *Painter*, 339 U. S. 629 (1950); *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Colorado Anti-Discrimination Commission* v. *Continental Airlines, Inc.*, 372 U. S. 714 (1963); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968); *Sullivan* v. *Little Hunt-*

ing Park, Inc., 396 U. S. 229 (1969); *San Antonio Independent School District* v. *Rodriguez*, 441 U. S. 1 (1973).

The "numerus clausus," the racial quota that is involved in this case, is of particular concern to the Jewish minority in this country because of the long history of discrimination against Jews by the use of quotas, both in Europe and in the United States. See, *e.g.*, HIGHER EDUCATION FOR AMERICAN DEMOCRACY, A REPORT OF THE PRESIDENT'S COMMISSION ON HIGHER EDUCATION 35 (1947); S. KENNEDY, JIM CROW GUIDE TO THE U. S. A. 92 (1959; 1973); Steinberg, *How Jewish Quotas Began*, 52 COMMENTARY 72 (1971). See also G. KISCH, THE JEWS IN MEDIEVAL GERMANY: A STUDY OF THEIR LEGAL AND SOCIAL STATUS (2d ed. 1970); J. MARCUS, THE RISE ANE DESTINY OF THE GERMAN JEW 11 (1934); S. SEGAL, THE NEW POLAND AND THE JEWS 197 (1938); L. KOCHAN, ed., THE JEWS IN SOVIET RUSSIA SINCE 1971 1-2, 17, 90, 91, 92, 94, 146 (2d ed. 1972); S. BARON, THE RUSSIAN JEW UNDER TSARS AND SOVIETS 57 (1964). Because of the importance to all groups within the American society of the questions presented by this case, an argument on behalf of any one group would be inappropriate. It may, nevertheless, be noted that after only 30 or 40 years of open admissions, the universities which, for centuries, set the style in excluding or restricting Jewish students, may, again be able to do so, again in the name of enlightenment, if the Washington decision is not reversed. See, *e.g.*, Steinberg, *How Jewish Quotas Began*, 52 COMMENTARY 72 (1971); Kramer, *What Lowell Said*, THE AMERICAN HEBREW 394 (1923).

STATEMENT.

Petitioner Marco DeFunis, applied for and was denied admission to the 1974 class commencing September, 1971 of the University of Washington Law School, the only law school

operated by the State of Washington. (Rev. Code of Washington, Ch. 28B.20) Thereupon DeFunis, his wife, and his parents brought suit in the Superior Court of the State of Washington, seeking an order that DeFunis be admitted on the ground that the procedures by which he was excluded were racially discriminatory. Following trial, the Superior Court ordered the admission of DeFunis. Pursuant to the court's order, he was enrolled as of September 22, 1971. The University appealed. On March 8, 1973, the Supreme Court of Washington reversed the order to admit DeFunis. On June 5, 1973, Mr. Justice Douglas stayed execution and enforcement of the judgment of the Washington Supreme Court pending disposition of an appeal or petition for a writ of certiorari in this Court.

Enrollment in the University of Washington Law School is limited overall to 445 students. The size of the entering class is dependent on the residual number after second and third-year students who continue in good standing are counted. In 1971, the number of places open in the first-year class was a maximum of 150. There were 1,601 applications.(St. 33-35.)*

The task of filling the places available in the first-year class was assigned to an admissions committee consisting of five faculty members and two students. (St. 330.) A "Guide for Applicants" issued by the law school described the admissions process that had been applied the previous year and announced that the law school anticipated it would "be applied in determining membership in the [entering] class of 1971." The Guide stated:

> In assessing applications, we began by trying to identify applicants who had the potential for outstanding performance in law school. We attempted to select applicants for admission from that group on the basis of their ability to to make significant contributions to law school classes and to the community at large.
>
> We gauged the potential for outstanding performance in law school not only from the existence of high test scores

* "St." refers to the Statement of Facts, which in this record contains the transcript of testimony.

and grade point averages, but also from careful analysis of recommendations, the quality of work in difficult analytical seminars, courses, and writing programs, the academic standards of the school attended by the applicant, the applicant's graduate work (if any), and the nature of the applicant's employment (if any), since graduation.

An applicant's ability to make significant contributions to law school classes and the community at large was assessed from such factors as his extracurricular and community activities, employment, and general background.

We gave no preference to, but did not discriminate against, either Washington residents or women in making our determinations. An applicant's racial or ethnic background was considered as one factor in our general attempt to convert formal credentials into realistic predictions. (Defendants' Exh. 45.)

While two general, non-racial factors in the admissions process were thus announced: (1) "potential for outstanding performance," and (2) "ability to make significant contributions to law school classes and to the community at large," testimony by the chairman of the admissions committee made it clear that the second factor was definitely subordinate, if indeed it had any substantial weight at all. The committee, its chairman explained, "proceeded in a fashion of trying to identify those individuals that it thought had the highest probability of success in law school with a possible secondary qualification of selecting from among those individuals on the basis of people who might make outstanding contributions to the law school classes under the law school community." (St. 360.)

In practice, the admissions process worked as follows. The committee had before it transcripts from all schools and colleges previously attended by the applicant, his score on the law school admissions test, which is nationally administered, letters of recommendation, and a statement by the applicant himself. (St. 338; 22.) By means of a formula combining the applicant's score in the law school admissions test and his junior and senior year college grade averages, a law school

predicted first-year average was established. (St. 360; 56; 181; 357.) All applicants whose predicted first-year average was 78 or above (the highest was 81), and a very high percentage (93 out of 105) of applicants with a predicted first year average between 77 and 78 were admitted. (Defendants' Answers to Interrogatories, Tr. 44.*)

Applications showing a score above 77 were thus treated almost automatically, on the basis simply of the numerical score. The same automatic treatment was afforded applications showing a score of 74.5 or below, but only if they were not applications of black Americans, Chicano Americans, native American Indians, or Philippine Americans. If not coming from these four groups, applications with a score of 74.5 or below were examined by the chairman of the admissions committee alone. Except in the case of applications of returning military veterans who had been admitted in earlier years, and with the exception also, as he testified, of "maybe one or two cases outside of the military area," the chairman of the admissions committee rejected all these low-score applications out of hand. Thus, as of August 1971, when the admissions process was virtually complete and some 275 acceptances had been sent out (allowing for non-acceptance among those invited), only nine applicants who were not Chicano, Indian, or Philippine and who had scores of 74.5 or below had been admitted, and these were overwhelmingly cases of returning veterans. (St. 340-41; Defendants' Answers to Interrogatories, Schedule A, Tr. 48-52.)

There was thus left a residual category of applications, which was divided into two groups. The first was the group of applications showing predicted first-year averages below 77 (with a few 77's included during the latter part of the process) (St. 340), but above 74.5, where the applicant was not black American, Chicano American, native American Indian, or Philippine American. This was the group that included DuFunis, whose score was 76.23. The second group consisted of ap-

* "Tr." refers to the Transcript of Record on Appeal to the Supreme Court of Washington.

plications of black Americans, Chicano Americans, native American Indians, or Philippine Americans regardless of the predicted first-year average so long as it was below 77, which included all but possibly one such application.* If it qualified on the basis of race, it did not matter that an application showed a score of 74.5 or below. It was put in this second group, rather than being consigned to the chairman of the admissions committee for summary disposition. Actually, 30 minority-group applications showing a score of 74.5 or below were eventually accepted. (St. 340-42, 351; Defendants' Exh. 44, p. 2; Defendants' Answers to Interrogatories, Schedule A, Tr. 48-52.)

Files in the first of these two residual groups—applicants who were not black, Chicano, Indian, or Philippine but whose averages fell between 77 and 74.5—were assigned to committee members at random for examination and report to the full committee, where they were acted upon. The second group, consisting of all but possibly one of the black American, Chicano American, native American Indian, and Philippine American applicants, were treated distinctly and separately. Having explained that two groups were left over after the virtually automatic admission of the high-score applicants and the virtually automatic exclusion of non-minority applicants with a score of 74.5 and below, and that these two groups formed a residual category, the chairman of the admissions committee testified: "The residual category, and let me segregate—segregate is the wrong word, but minorities were put aside for separate con-

* Defendants' Exh. 44, p. 2, shows that one black applicant (and no Chicano, Indian, or Philippine applicant) had a score higher than DeFunis's 76.23. But we are not told whether this black applicant's score was as high as 77 or above. Comparing Schedule A to Defendants' Answer to Interrogatories (Tr. 48-53), with Exhibit 44 makes plain that the listing of minority group members in Schedule A includes Asians other than Philippine Americans. Such other Asians received no preferential treatment and did not form part of the second group discussed in the text. The score of the black applicant in question cannot be determined from Schedule A.

sideration." (St. 344.) Files of black applicants were sent to a sub-committee consisting of a black law student and a faculty member who had worked during the previous summer with a special federally-funded program for training disadvantaged college graduates interested in a career in law. (St. 359.) Files of Chicano Americans, native American Indians, and Philippine Americans were sent to an associate dean for review. The sub-committe for black applicants and the associate dean who reviewed other minority files reported back to the full admissions committee with recommendations for acceptance and rejection. (St. 352, 121-26.)

Files in this separately treated group of black Americans, Chicano Americans, native American Indians, and Philippine Americans were compared only with each other and not with the other applications passed upon by the committee or by its chairman individually. "Our notion in separating that category," the chairman of the admissions committee testified, "was an attempt to try to compare, to the extent we could, applications that were essentially comparable, that is, we wish to treat and consider the minority applications in the context of examining minority applications rather than sprinkled throughout a group of simply the entire group of applications to the law school." (St. 351; St. 399.) The effort was to find "within the minority category, those persons who we thought had the highest probability of succeeding on law school." (St. 353.) The reason for including a black student in the sub-committee to which files of black applicants were assigned was the admissions committee's "assumption . . . that a black person can better interpret the experiences and background and educational opportunities that a black has been exposed to than a white person can." (St. 402.)

By the method described, 37 black American, Chicano American, native American Indian and Philippine American applicants were offered admission to the law school.* Of the

* The trial court found that 44 Afro-American, Asian-American, Chicano-American, and American Indian applicants were admitted

37, one had a predicted first-year average higher than petitioner De Funis's 76.23. Thirty-six had predicted first-year averages below De Funis's. Thirty of them, as already noted, had averages below 74.5, and but for their racial classification would have been summarily rejected. There were other applicants also who were admitted with first-year predicted averages below that of petitioner De Funis, 23 of them as returning veterans who had previously been admitted, and 25 for other reasons that commended themselves to the discretion of the admissions committee. The lowest score for a non-minority group applicant who was admitted was 72.72. Twenty-four minority applicants were admitted with scores below that. (Defendants' Exh. 44; Defendants' Answers to Interrogatories, Schedule A, Tr. 48-52.)

The predicted first-year average was not the sole admissions criterion employed by the law school, but the record is clear that taking all criteria into account, in the law school's own judgment, its minority-preference program resulted in the admission, in the aggregate, of students acknowledged to be less qualified than others who were not members of the designated minority groups and who were, therefore, rejected. The dean of the law school testified that "we do not want to go to the point where we are taking people who are unqualified in an absolute sense, and that is that they have no reasonable probable likelihood of having a chance of succeeding in the study of law with such academic supportive assistance that we can give them." (St. 420.) But he testified candidly that "I would be misleading you, I think, if I suggested" that minority students with low credentials who are admitted are "necessarily as likely to succeed in the law school curriculum as certain of the ma-

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as "minority" students, and we referred to this finding at p. 6 of our Brief as *Amicus Curiae* in Support of Jurisdictional Statement or in the Alternative Petition for Certiorari. The figure used by the trial court includes Asian Americans other than Philippine Americans who were in fact subjected to no special or separate admissions process but were treated in ordinary fashion in common with non-minority applicants. (St. 352; Defendants' Exhibit 44.)

jority students who are not admitted." (St. 418.) And defining the term "qualified" as indicating "the likelihood or probability [that] the student has the potential for successful study of law according to our curriculum," the dean added: "On that basis, we do take, in my opinion, some minority students who at least, viewed as a group, have a less such likelihood than the majority student group taken as a whole." (St. 423.) There followed this colloquy:

> Q. Of these who have made application to go to the law school, I am saying you are not taking the best qualified?
> A. In total?
> Q. In total.
> A. In using this definition, yes. (St. 423-24.)

The chairman of the admissions committee testified that there was no fixed quota determining the number of minority students to be admitted by the special, separate process adopted by the law school. (St. 353.) But there was, if not a precise number, then a zone or an order of magnitude. As indicated above, the policy was not to take applicants who were unqualified in the absolute sense that they had no reasonable chance of succeeding, even with supportive assistance. It was in that sense, in the sense of resisting the temptation to "say we are going to take X number of black students no matter what," that the dean testified: "We do not have a quota. . . ." But at this point also he added: "We want a reasonable representation. We will go down to reach it if we can," without "taking people who are unqualified in an absolute sense. . . ." (St. 420.)

The stated rationale for the minority-preference policy was that the minority racial and ethnic groups whom the law school now sought to provide with a "reasonable representation" were those which had been "historically suppressed and excluded from participation in what might be thought of I suppose, the main stream of our society, and certainly in participation in the legal arena." (St. 416.) But there is no evidence in this

record, or in any materials outside the record we have been able to find that might be suitable for judicial notice, of discrimination against the four groups in question by the University of Washington. The President of the University, pledging in a speech to students that the University would make "special provision for disadvantaged black Americans," gave as the reasons for the policy the existence of slavery in the United States until the Civil War and "the history after slavery of a hundred years of separate and unequal treatment," which he said would have to be "matched by at least some years of separate and unequal treatment the other way if the situation is to be remedied." (Defendants' Exh. 13.) There is thus no indication of consciousness on the part of officials of the University of separate and unequal or otherwise discriminatory treatment of the groups in question at the University of Washington or in the State of Washington. The record shows only that for the year 1969-70, the University of Washington Law School reported an enrollment of eight black students out of a total of 356. (Defendants' Exh. 7.) That comes to approximately 2.2%, and compares favorably with a percentage of blacks in the population of the state of Washington, which is 2.1, and in the populations of the neighboring states of Oregon, Idaho, and Montana. See *United States Bureau of the Census, Census of Population: 1970, General Population Characteristics,* Washington, Final Report PC (1)-B49, Table 18; Idaho Final Report PC (1)-B14, Table 18; Montana, Final Report PC (1)-B29, Table 18.

Nor is there any showing in this record that the criteria used for admission, and particularly the first-year average, are not probative of qualification and therefore operate to discriminate against certain groups on the basis of race or ethnic origin. Cf. *Griggs* v. *Duke Power Co.,* 401 U. S. 424 (1971). On the contrary, as noted earlier, it was conceded that the result of diluting these criteria was the admission of relatively less qualified applicants. There is testimony in the record —opinion evidence—that groups that have been handicapped

over a long period of time "by virtue of economic and other circumstances" and that have not had "the educational condition and economic advantages for education [of] members of other groups" are in a different position from those other groups because: (1) they "may not [have been] exposed to the same kind of emphasis on certain skill developments and so on," and (2) "our usual methods for evaluating applicants are not particularly accurate" as to them. Some of the indicators used, said the dean of the law school, "have a margin of error even as to students from the major culture, and we know that as to students from these minority cultures, they may be even less reliable." (St. 416-17; see also St. 73-74.)

This assumption, it is clear, underlay the minority-preference policy. But it is equally clear on this record that this assumption amounted to absolutely nothing more than the judgment, acknowledged by the dean of the law school as noted above, that applicants admitted under the special minority-preference program were in the aggregate less qualified than other applicants admitted in the regular course, and than some applicants who were rejected. The law school neither abandoned the criteria by which it judged qualifications, however imperfect, nor so far as this record shows evolved and applied any special criteria, specially suitable to the groups in question and capable of assessing their qualifications as rigorously as those of other applicants were assessed. The assumption that the criteria normally used were less than usually accurate with respect to the groups in questions turns out on this record to be nothing more than an assumption that owing to various conditions of deprivation applicants admitted under the minority-preference policy were less qualified than other applicants.

Moreover, there is no pretense in this record that the assumption of cultural and economic disadvantage as applied to any particular individual applicant rested on anything but his race, or that the contrary assumption, namely, that an applicant had had the normal cultural and economic advantages, in turn

rested on anything but the applicant's race. Nothing in this record indicates that membership in one of the four racial groups that received preferential treatment correlates with cultural and economic deprivation, or that any effort was made to find such a correlation. And the evidence is clear that no effort was made to examine the mass of applications for indications of cultural or economic deprivation, whatever the race of the applicant.

The dean of the law school referred to the term, "cultural disadvantage," as a sort of "cloak of language" (St. 417.), and when asked to define the difference between a minority group and a culturally disadvantaged person or group, he replied that "the semantics of this whole thing are something of a problem." (St. 424-25.) There is in this record a fully candid recognition that the law school admissions policy singled out for separate treatment applications of certain persons solely on the basis of race, and judged them more indulgently than other applications. On this record, therefore, the assumption of economic and cultural disadvantage, as a rationale for the minority-preference policy merges into the rationale of historic conditions of oppression and discrimination.

An alternate and broader possible rationale is explicitly disavowed in this record. The law school, the chairman of the admissions committee testified, did not pursue a general policy of trying to achieve a balanced class. "About the only thing, I suppose," he said, "that can be said in this direction is, of course, the policy with respect to the representation within the law school community of minority students, if that, in some sense, can be considered an issue of class balance; negatively, I suppose, in negating the general overtones of class balance, the committee did not proceed to, with respect to any stated policy, certainly with the view of trying to procure certain numbers of individuals from various parts of the United States, from various employment skills, from various undergraduate majors, or any of the other numerous possible means that one could have for saying a class has balance." (St. 360.)

On this record, the trial court ordered DeFunis's admission on the ground that he had been excluded only by reason of his race.

The Supreme Court of Washington reversed the judgment of the trial court. The Supreme Court held that plaintiff had standing to raise the issues presented, and that the case was not moot. 507 P. 2d at 1177, n. 6. Coming to the merits, the court held that the law school's admissions policy did not constitute invidious and stigmatizing discrimination any more than did the color-conscious policies mandated, and in a dictum permitted, by this Court in *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U. S. 1, 16 (1971), or by certain decisions of lower federal courts such as *Carter* v. *Gallagher*, 452 F. 2d 315 (8th Cir. 1971), *cert. denied*, 416 U. S. 950 (1972); *Porcelli* v. *Titus*, 431 F. 2d 1254 (3d Cir. 1970), *cert. denied*, 402 U. S. 944 (1971); *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159 (3d Cir. 1971)), *cert. denied*, 404 U. S. 584 (1971). Nevertheless, the Washington Supreme Court held, a compelling state interest must be shown in order to justify classifications based on race. It found such compelling state interests in: (1) The elimination of "racial imbalance within public legal education," 507 P. 2d at 1182, having regard to the fact that racial minorities are as fully taxed as anyone else for the support of public education, including public legal education; (2) The production of "a racially balanced student body at the law school," 507 P. 2d at 1184, which may be considered necessary by educational authorities in order to train lawyers fully competent to practice in the American multi-racial society; (3) The alleviation of a nation-wide "shortage of minority attorneys." 507 P. 2d at 1184.

It had been suggested, the court said, that these compelling state purposes could be served by improving elementary and secondary education of minority students so that they could

secure equal representation by having their applications to law school considered competitively, with no need for preferential consideration. Such a program, the court went on, would not work effectively in the foreseeable future. Consequently there were no less restrictive means available that would serve the state's compelling interest as effectively as a preferential minority admissions policy.

The court noted that underlying the law school's admissions policy was the assumption that certain racial groups had been historically suppressed and disadvantaged. But the court did not appear to view this assumption, which it shared, as in itself constituting a compelling state interest. The court also set aside as not relevant for purposes of decision of the case questions whether *de jure* or *de facto* discrimination had existed at the University of Washington.

The court held further that there was no denial of equal protection in that feature of the law school's policy which singled out only certain racial groups, since in light of the purpose of the policy the racial classification did not need to include all racial minority groups. Finally the court held that the law school's admissions procedures and their application did not constitute arbitrary and capricious administrative action. Predetermined standards and procedures were used, but a numerical criterion was not the only one that was employed. The numerical criterion was departed from for reasons having to do with race, but in other cases for other reasons as well, including the likelihood that an applicant would make a contribution to the law school and to the community at large following graduation.

Justice Wright, while joining the majority opinion, filed a brief concurrence emphasizing the point that a "law school admissions program should not and need not be based upon purely mathematical factors." 507 P. 2d at 1188. Justice Finley and Stafford, who had also joined in the opinion of the court, joined in Justice Wright's concurrence as well.

Chief Justice Hale, with whom Justice Hunter joined, filed a dissent. The law school's admissions program violated the 14th Amendment, Chief Justice Hale maintained, and could not be sanctioned by the holdings of any of the cases relied upon by the majority. "The circle of inequality cannot be broken," said the Chief Justice, "by shifting the inequities from one man to his neighbor." 507 P. 2d at 1189. The Chief Justice also regarded the administration of the law school's admissions policy as being capricious and arbitrary even aside from its preferential feature based on race. Justice Hunter also added a brief dissenting opinion making the same point. 507 P. 2d at 1200.

SUMMARY OF ARGUMENT.

Marco DeFunis was not permitted to compete for all of the places in the entering class of the University of Washington Law School. He was excluded solely because of his race from a significant number of places which were set aside and reserved for other races. Had DeFunis been black, Indian, Chicano or Philippine, such exclusion would have been unconstitutional. (Indeed if DeFunis were any of these, most of those appearing against him here would be his champions instead of his adversaries.) If the Constitution prohibits exclusion of blacks and other minorities on racial grounds, it cannot permit the exclusion of whites on racial grounds. For it must be the exclusion on racial grounds which offends the Constitution, and not the particular skin color of the person excluded.

For at least a generation the lesson of the great decisions of this Court and the lesson of contemporary history have been the same: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are now to be more equal than others. Having found

support in the Constitution for equality, they now claim support for inequality under the same Constitution. This is the classic hard case making very bad law.

A state-imposed racial quota is a *per se* violation of the Equal Protection Clause because it utilizes a factor for measurement that is necessarily irrelevant to any constitutionally acceptable legislative purpose. A racial quota is a device for establishing a status, a caste, determining superiority or inferiority for a class measured by race without regard to individual merit.

There was a finding by both courts below that the State of Washington used racial criteria to exclude DeFunis from admission to the State's law school. Exclusion from a state law school on the basis of race has long since been declared by this Court to be unconstitutional.

The only justification for use by a state of a racial classification is its use to cure or alleviate specific, illegal racial discrimination. There is no basis in this record even to suggest earlier illegal racial discrimination to be remedied by the racial quota adopted by the law school here.

Even if a racial quota were not, *per se*, a violation of the Equal Protection Clause, like any racial classification it was not available for use by a state in the absence of a "compelling state interest." There is no "compelling state interest" shown on this record.

ARGUMENT.

The Racial Quota Utilized by the Law School of the University of the State of Washington Is a Violation of the Equal Protection Clause of the Fourteenth Amendment.

The facts have been set out in detail in the above Statement in order to reveal the true nature of the racial quota system for admissions adopted by the University of Washington Law School. The size of the class was fixed within approximately

five places. There was no suggestion that class size was expandable. (St. 115, 333-34.) Minority and majority applicants, as those terms were defined by the law school, went through separate, segregated admission procedures. (St. 351; 359; 399; 402.) As the chairman of the admissions committee stated: "The residual category, and let me segregate—segregate is the wrong word, but minorities were put aside for separate consideration." (St. 344.) The most desirable students were chosen within each of the two groups. (St. 353; 420.) But the candidates in one group were never considered in competition for the places allotted to the other group. (St. 353; 399.) The number of places allotted to minority applicants was changed from year to year by as inconspicuous a decision as possible. But a quota is no less a quota because it is not labelled as such or because it is subject to annual adjustment. (St. 416; 420.)

The use of the quota system—the segregation of two groups of applicants by race with admission for each group limited to its assigned numbers—makes it clear that this is not simply a case where race was used as one among many factors to determine admission. Instead, the law school used race as the criterion for imposing entirely separate admissions procedures. The class that entered the University of Washington Law School in 1971 was in fact two classes, distinguished in terms of racial attributes, one of "minority" students and the other of "majority" students, recognized and chosen as such by the University. To the extent that a place was assigned to one group, it was inaccessible to a student from the other group. What was demonstrated by the law school here was not a form of integration of races but rather a form of segregation of the races.

Never, since this Court struck down what Mr. Roy Wilkins has called a "zero quota" (N. Y. Post, 3 March 1973) in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), has a racial quota been approved by this Court. Both proponents and opponents of integration have recognized such quotas as *per se*

violations of the Equal Protection Clause that cannot be justified. That is why respondents try to assert that what is involved here is not a "quota." For a quota is not merely a racial classification. It is an attribution of status—of caste—fixed by race. A quota necessarily legislates not equality, but a governmental rule of racial differences without regard to an individual's attributes or merits.

This is made clear by the fact that the "minority" applicants were not judged by different criteria for admission than were applied to the "majority" candidates. The predictive factors for measuring potential success in law school were the same for both groups. What was different was the law school's ruling that "minority" candidates, because of their race, could not be expected to meet the higher standards established for "majority" students, without any regard to be given to individual capacities. Here lies the inherent evil of quotas that reverse the objective of Anglo-American democracies to move toward freedom by the rejection of status, measured by immutable factors like race, for assigning an individual his place in our society.

I. Any Racial Classification by a State Is Presumptively Invalid Under the Equal Protection Clause of the Fourteenth Amendment.

A generation ago, this Court held that the exclusion of a black applicant from a state university law school solely because of his race was a violation of the Equal Protection Clause. *Sweatt* v. *Painter*, 339 U. S. 629 (1950). The Court is, nevertheless, asked here to hold that the exclusion of a non-black applicant from the law school of the State of Washington, solely because of his race, is a valid racial classification. We respectfully submit that the rule of equality mandated by this Court in *Sweatt* v. *Painter* compels the reversal of the judgment of the Supreme Court of Washington in this case.

It has long been established that a racial classification imposed by "official state sources," *Loving* v. *Virginia*, 388 U. S.

1, 10 (1967), is presumed to be invalid under the Equal Protection Clause.

> [W]e deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classification "constitutionally suspect," *Bolling* v. *Sharpe*, 347 U. S. 497, 499; and subject to the "most rigid scrutiny," *Korematsu* v. *United States*, 323 U. S. 214, 216; and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose. *Hirabayashi* v. *United States*, 320 U. S. 81, 100. (*McLaughlin* v. *Florida*, 379 U. S. 184, 191, 192 (1964).)

Racial discrimination is not justified because the burden of the state action falls on both races or all races so classified. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948).

There is no question here but that DeFunis's exclusion from the state law school was a result of a racial classification. The trial court ordered DeFunis's admission for that reason. Nor did the Supreme Court of Washington disagree with the lower court that the law school had used a racial classification to exclude DeFunis. Rather, it announced that, in ostensible conformity with the commands of this Court, "the burden is upon the law school to show that its consideration of race in admitting students is necessary to the accomplishment of a compelling state interest." (507 P. 2d at 1182.)

In short, the controversy in this Court is not over the question whether a racial classification was used as the basis for the exclusion of DeFunis, but whether that otherwise unconstitutional racial classification was validated by "a compelling state interest."

It is our position that a racial classification that takes the form of a racial quota, as in this case, is unconstitutional *vel non*, because racial quotas are anathema to the concept of individual freedom. But we submit that even if a racial quota does not fall into a special invalid category of its own giving rise to an irrebuttable presumption of violation of the Fourteenth Amendment, the racial classification here cannot be validly imposed within the limits of the Equal Protection Clause.

II. A Racial Classification by a State Is Invalid Under the Equal Protection Clause Except as a Specific Remedy for Specific Unconstitutional or Illegal Racial Discrimination.

Not since *Hirabayashi* v. *United States*, 320 U. S. 81 (1943), and *Korematsu* v. *United States*, 323 U. S. 214 (1944), has this Court permitted the use of race as a factor for classification, except to cure an earlier illegally imposed racial discrimination. And even in those cases in which this Court has sanctioned such limited cognizance of a racial factor, the use of the racial factor has been condoned only to assure the elimination of the illegal discrimination and never as a tool for "reverse discrimination" of the kind sought to be justified by the Washington Supreme Court here. Cf. *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 430-31 (1971).

The Washington Supreme Court rested heavily on a dictum of this Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 16 (1971), which affords no support for the conclusion reached by the state court. At most, *Swann*, in its context of remedial litigation, suggested that a school system might provide for the distribution of students already in the system in the relative proportions of the races in the school system as a whole.

Indeed, the Washington Supreme Court recognized that the use of "race" in *Swann* was justified only "to prevent the perpetuation of discrimination and to undo the effects of past segregation." (507 P. 2d at 1180.) But it failed to recognize

that there was no showing on the record in this case of any pas discrimination by respondents that purported to be remedied by tne law school's use of a racial quota. Nor did it seem to understand that *Swann* did not endorse a "fixed racial balance or quota" even in the presence of a clear demonstration of prior discrimination. *Winston-Salem/Forsyth County Board of Education* v. *Scott*, 404 U. S. 1221, 1227 (1971).

It is equally important to see that in *Swann*, and other cases dealing with segregation in public schools, the contemplated remedy—a remedy for specific racial discrimination—is a reassignment of students within the system. The "racial balances" involved in those cases denied no white or black, Indian or Asiatic, education at a state school. Here, however, the law school's admission process flatly denied access of white students, including DeFunis, to state educational facilities in order to make them available to others of different race, because of their race.

Each of the cases cited by the Washington Supreme Court to justify the racial discrimination indulged by the law school here, *e.g.*, *Swann, supra; Porcelli* v. *Titus*, 431 F. 2d 1254 (3d Cir., 1970); *Carter* v. *Gallagher*, 452 F. 2d 315 (8th Cir., 1971), tolerates the use of a racial standard by the state, but only to cure racial discrimination imposed by the party against whom the remedy is ordererd. In this case, however, there is nothing in the record on which to base a finding of unequal treatment by race in the University of Washington, or, indeed, in the State of Washington.

Generalized historical assertion about conditions somewhere in the United States some time in the past is not the premise of the remedial discrimination cases decided by this Court, nor should it be. If such a predicate were allowed to replace careful, specific findings of discrimination as the necessary condition for sustaining reverse discrimination, such state racial preferences would be constitutionally sanctioned in a wide range of circumstances that would denigrate if not destroy the concept of

racial equality specified in the Equal Protection Clause. Nor, in the light of our history, see, *e.g.*, G. MYERS, A HISTORY OF BIGOTRY IN THE UNITED STATES (rev. ed. 1960), would such "benevolence" be limited to those few "minorities" singled out by the State of Washington here. "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving* v. *Virginia*, 388 U. S. 1, 10 (1967).

We submit that the use of race as a standard for the elimination of specific prior racial discrimination permits only the elimination of specific prior racial discrimination and not a substitution of racial discrimination against others.

III. The "Benign" Intent of the Framers of the Racial Quota Here Cannot Save It. The Validity of State Racial Discrimination Is Measured by Effect Not Motive.

It is argued that the racial quotas adopted by the law school here are not "invidious" because their purpose was "benign." But respondents' purpose in effecting its racial quota system is irrelevant. It is not the purpose but the effect of a racial classification that commands its invalidation. Cf. *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 432 (1971). This is a lesson that this Court has continuously declared. For example, in *Wright* v. *Council of City of Emporia*, 407 U. S. 451, 462 (1972), the Court answered "Thus, we have focused upon the effect—not the purpose or motivation—of a school board's action in determining whether it is a permissible method of dismantling a dual system. The existence of a permissible purpose cannot sustain an action that has an impermissible effect." And in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725 (1961), the Court said: "[N]o State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith."

The Supreme Court of Washington conceded that "the minority admissions policy is certainly not benign with respect to nonminority students who are displaced by it." (507 P. 2d at 1182.) Since it is the "nonminority student" who is the victim of this invalid racial classification, that should suffice to dispose of the argument of the benign nature of the racial classification. But there is even reason to doubt the State court's notion that the evil of a racial quota does not stigmatize the "minority student" who gains admissions under such circumstances. For there is certainly the great possibility of that consequence, especially where, as under the law school's admissions program, the lower admission standards for "minority students" were such a well-publicized element. (St. 418; Exh. 45.) A recent black graduate of a law school put the problem cogently:

> Traditionally, first-year law students are supposed to be afraid, or at least awed; but our fear was compounded by the uncommunicated realization that perhaps we were not authentic law students and the uneasy suspicion that our classmates knew that we were not, and like certain members of the faculty, had developed paternalistic attitudes toward us. (McPherson, *The Black Law Student: A Problem of Fidelities*, ATLANTIC 88 (April 1970).)

The quota system is admittedly not "benign" so far as the excluded majority applicants are concerned. There is little or no basis for suggesting that it is not "invidious" and "stigmatizing" for the category of applicant labelled by race as incapable of meeting the standards applied to others. See Graglia, *Special Admission of the "Culturally Deprived" to Law School*, 119 U. PA. L. REV. 351, 353-59 (1970).

Indeed, a racial quota is always stigmatizing and invidious, particularly when it is applied to areas concerned with intellectual competency and capacity.* This is so essentially for the

* It is suggested that such a statement lacks sincerity if made by a non-black. And so we have attached as an Appendix to this brief a copy of a nationally syndicated interview with Dr. Kenneth Clark, no stranger to this Court's decisions, which confirms the position advanced by us here.

reasons stated by Professor Thomas Sowell in his book BLACK EDUCATION, MYTHS AND TRAGEDIES 292 (1972):

> [T]he actual harm done by quotas is far greater than having a few incompetent people here and there—and the harm that will actually be done will be harm primarily to the *black* population. What all the arguments and campaigns for quotas are really saying, loud and clear, is that *black people just don't have it*, and that they will have to be *given* something in order to have something. The devastating impact of this message on black people—particularly black young people—will outweigh any few extra jobs that may result from this strategy. Those black people who are already competent, and who could be instrumental in producing more competence among this rising generation, will be completely undermined, as black becomes synonymous—in the minds of black and white alike—with incompetence, and black achievement becomes synonymous with charity or payoffs.

A racial quota is derogatory to those it is intended to benefit and depriving of those from whom is taken what is "given" to the minority. A beneficent quota is invidious as it is patronizing.

IV. There Are No "Compelling State Interests" to Justify the Racial Quotas Used by the Respondents to Determine Admission to the State's Law School.

The Washington Supreme Court announced that the law school's racial policies were on their face presumptively invalid but might be justified on a showing of a "compelling state interest." It then examined the evidence and proceeded to validate the racial quotas on what, at most, could be called a "rational means" test.

As we have already argued, there can be no "compelling state interest" for racial classification by the state except for its use to eliminate adverse racial classification theretofore imposed, or perhaps where the nation's security in time of war may be thought to justify such classification. See *Korematsu* v. *United*

States, 323 U. S. 214 (1944); *Hirabayashi* v. *United States*, 320 U. S. 81 (1943). Assuming, however, that racial quotas can be justified by some other "compelling state interest," there is no such interest justified in this record.

The record in this case is devoid of support for the conclusion of "compelling state interest." Indeed, there was no conscious effort by respondents at trial to demonstrate any compelling state interest. Respondents' case rested primarily on "the cultural disadvantage" which the admissions committee wished to take into account in awarding places in the class. It was assumed, but not shown, that cultural disadvantage could be correlated with the four minority groups whose members were to be given preferential treatment. (St. 416; 73-74; 90; 108; 353; 400-01; 418-19; 424-25.) As one witness on compensatory pre-law training put it: "In formal terms, we articulate our concern for the economically and culturally disadvantaged. I suppose in practical terms our efforts have been largely with the minority group student . . ." (St. 125.) The equation between the "minority group students" and the culturally deprived can no more be made to justify racial classification than can the equation between minority groups and the economically deprived in the political sphere. *Compare Reitman* v. *Mulkey*, 387 U. S. 369 (1967), *with James* v. *Valtierra*, 402 U. S. 137 (1971).

When asked to explain the law school's race-based preferential treatment, respondents repeatedly claimed to be favoring applicants from deprived cultural and educational backgrounds. Those who offered this justification included the chairman of the school's admissions committee (St. 352; 402), the dean of the law school (St. 416-18; 424-25), the president of the University (St. 225; 243-44), and the former chairman of the board of trustees of the university (St. 108, 111). The evidence is, however, clear that defendants did not give preferential treatment to "deprived students" who were not blacks,

Chicanos, Indians, or Philippinos. (See, *e.g.*, St. 344; 352; 399.)

There is nothing in this record that shows that membership in one of the four minority races correlates with such deprivation. Indeed, a member of one of the favored minorities was to be treated as "culturally deprived" so far as the law school was concerned, even if he came from a highly intellectual and cultured family. Moreover, if a correlation could be made that showed every member of the four racial minorities to fall into the category of culturally and educationally deprived, the classification would still be invalid for underinclusiveness because it would fail to include culturally and economically deprived persons who are not members of these four racial minorities.

What the Constitution prohibits is that admissions be determined by race. Equal protection might not be offended by consideration of cultural deprivation; it is offended by considerations of race. If elimination of cultural deprivation were the compelling principle, however, it was not the guide used for special treatment for admissions to the law school here. The rule established for the University of Washington School of Law was simply that it was easier for a black, a Chicano, an American Indian, or a Philippino to enter than for a white or an Asian, without regard to the cultural deprivation from which the applicant may or may not have suffered. (St. 108-09; 225; 243-44; 261; 418; 423-24; 431.)

To support the so-called state interest in discrimination on the basis of race the Supreme Court of Washington relied only on three bits of evidence: (1) a self-serving declaration by the dean of the law school (St. 416); (2) the text of an impromptu speech given by the president of the University to a group of striking black students in 1968 during the time of the "university troubles" (Exh. 13); and (3) a "Survey of Black Law Student Enrollment" giving statistics for 125 law schools including the University of Washington School of Law for the

year 1970-71 (Exh. 7). These three items are patently inadequate to carry the "heavy burden" of showing a compelling state interest of the State of Washington in discriminating in favor of four racial groups in filling its law school classes.

In this case the State, thus, made only a token effort to shoulder the heavy burden of proving a compelling state interest in racial discrimination. Even if the minimal proof accepted by the Supreme Court of Washington could qualify under a rational means test, it cannot meet the compelling state interest test. The substitution of the lower quantum of proof is explicitly forbidden by a consistent line of cases in this Court dealing with racial classifications. *Slaughterhouse Cases,* 16 Wall. 36, 71 (1870: *Strauder* v. *West Virginia,* 100 U. S. 303, 307-08 (1880); Ex parte *Virginia,* 100 U. S. 339, 344-45 (1880); *Hirabayashi* v. *United States,* 320 U. S. 81, 100 (1943); *Korematsu* v. *United States,* 323 U. S. 214, 216 (1944); *Oyama* v. *California,* 332 U. S. 633, 644-46 (1948); *Bolling* v. *Sharpe,* 347 U. S. 497, 499, (1954); *McLaughlin* v. *Florida,* 379 U. S. 184, 191-92 (1964); *Loving* v. *Virginia,* 388 U. S. 1, 10-11 (1967); *Hunter* v. *Erickson,* 393 U. S. 385, 392 (1969); *Graham* v. *Richardson,* 403 U. S. 365, 372 (1971).

That the compelling state interest necessary to justify a racial quota has not been established here may be quickly seen from a glance at the decisions of this Court in recent years that have applied that standard. Although none of them involved so patent a violation of the Equal Protection Clause as a racial quota, in each case this Court has ruled that the interest of the state was not sufficient to override the prima facie violation of the Equal Protection Clause. *McLaughlin* v. *Florida,* 379 U. S. 184 (1964); *Carrington* v. *Rash,* 380 U. S. 89 (1965); *Harper* v. *State Board of Elections,* 383 U. S. 663 (1966); *Williams* v. *Rhodes,* 393 U. S. 23 (1968); *Kraemer* v. *Union Free School District,* 395 U. S. 621 (1969); *Dunn* v. *Blumstein,* 405 U. S. 330 (1972). Indeed, as the Chief Justice pointed out in his dissent in *Dunn* v. *Blumstein,* "[No] state law has ever satisfied this

seemingly insurmountable standard." (405 U. S. 330, 363-64 (1972).)

The "compelling interest" standard has another attribute that was substantially ignored by the Washington Supreme Court and that dictates the reversal of that court's judgment. This Court stated in *Dunn* v. *Blumstein, supra,* 405 U. S. at 343: "[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" There was in this case no substantial undertaking to discover the feasibility of means other than the utilization of a presumptively invalid racial quota for admission to the law school to accomplish the alleged state interests asserted here.

Obviously, as the compelling state interest cases already cited reveal, this Court is not the place to examine the alternatives that might permit the State to bring more of the culturally deprived members of racial minorities into the law school on an equal footing with other students. Affirmative action programs, not quotas are the requirements of national policy. (See our brief in support of the petition for certiorari in this case at pp. 19 *et seq.*) An "open admission" policy without racial standards might afford the answer. It might also be possible to open more places in law schools at the University of Washington or in other State university facilities where admission would not depend on the racial characteristics of the applicants. Special schooling might be afforded for preparation for admission to law schools for those who cannot meet the existent standards without such additional training, but again only so long as that schooling is not afforded on a racial basis. This case, however, involves no legitimate affirmative action, but a racial quota. As our brief in support of the petition for certiorari pointed out, so-called affirmative action programs that are not circumscribed in terms consistent with the Equal Protection Clause collapse into the very evil they seek to cure.

The social problem that the Washington Supreme Court purported to address cannot properly be considered one of quantity rather than quality. Even if it were legitimate to postulate, as that court did, that a lawyer or doctor should be trained to serve only persons of the same skin color or parental origins —a proposition that itself is inconsistent with the doctrine of equality underlying the Fourteenth Amendment—those doctors and lawyers should have the same appropriate skills and capacities as those practising their professions on behalf of others. The answer to the problem cannot be, as the Washington court would have it, a simple play on numbers. This we think should be evident from the fact that the alleged compelling state interest asserted by the Washington court here—providing training for black lawyers to serve black clients—would most easily and readily be met by creation of additional separate law schools for "minority" applicants who do not meet the standards for admission to existent law schools. No one doubts that the patent invalidity of such racial classification could not be overcome by the "compelling state interest" asserted here. Neither can the racial device actually used by the law school be justified by the "compelling state interest" found by the Washington Supreme Court.

The most charitable reading of the Washington Supreme Court's decision is that it has said that the alternative means for reaching its goal are more difficult, more time-consuming, more expensive. So long as the alternatives have the virtue of constitutionality, however, the Equal Protection Clause commands their use rather than the unconstitutional means that may be quicker, or less difficult, or less expensive. If the goals attributed to the state here are constitutionally valid, they cannot be accomplished by the unconstitutional means of that most invidious of discriminatory devices, the racial quota.

CONCLUSION.

The judgment below should be reversed because it condones the use of a patently unconstitutional means to an invalid end. A racial quota creates a status on the basis of factors that have to be irrelevant to any objectives of a democratic society, the factors of skin color or parental origin. A racial quota derogates the human dignity and individuality of all to whom it is applied. A racial quota is invidious in principle as well as in practice. Though it may be thought here to help "minority" students, it can as easily be turned against those same or other minorities. The history of the racial quota is a history of subjugation not beneficence.

The evil of the racial quota lies not in its name but in its effect. A quota by any other name is still a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant, politically, economically, and socially.

Respectfully submitted,

ALEXANDER M. BICKEL,
261 St. Ronan Street,
New Haven, Connecticut 06511,

PHILIP B. KURLAND,
Two First National Plaza,
Chicago, Illinois 60670,
Attorneys for Amicus Curiae.

LARRY M. LAVINSKY,
300 Park Avenue,
New York, New York 10022,

ARNOLD FORSTER,
315 Lexington Avenue,
New York, New York 10016,
Of Counsel.

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Disadvantaged a Bad Word

By Anne Roth

What are the most urgent needs of disadvantaged, minority group children?

To be free of the label of disadvantaged — whether it's used with sentiment or compassion or as an excuse for public racism — and to be held to a single standard of high performance in school by fellow teachers.

So says Dr. Kenneth B. Clark, psychologist and educator. Dr. Clark is president of the Metropolitan Applied Research Center in New York, professor of psychology at City College of New York and author of several books about the effect of racism on young minds.

Calling [illegible] minority-group youngsters "disadvantaged" or "culturally deprived" and lowering academic expectations and school standards — even out of kindness and compassion — quickly becomes a self-fulfilling prophecy of massive educational underachievement, Dr. Clark emphasizes.

This compassion "is based on characterizing or stereotyping whole groups of children as intellectually and academically inferior," notes Dr. Clark. Assuming they cannot achieve normally in school [illegible] economic, environmental, racial and personal disadvantages have been removed simply becomes "an excuse or an explanation for the unwillingness or inability" to provide them effective education.

"In the culture these cultural, environmental and educational theories about disadvantages are seen as expressions of racism and as reflecting an understanding and compassion for the limitations of the culturally deprived child," acknowledges Dr. Clark.

"But under the guise of compassion and understanding, educational deficiencies are condoned and under conditions encouraged," he says.

"The apparent acceptance of these children by minimizing the limitations of their intellectual and academic capacity and modifying classroom, and school policies and procedures has primarily the same effect as racial rejection."

Says Dr. Clark, "For blacks to be held to lower standards, different standards or to excuse cases on standards is a most contemptible form of racism.

"I BE THE LEAD of a static situation in which minority-group children in a school or educational setting where compassionate acceptance and understanding translated into terms of lowered expectations, have led to any acceptable kind of performance on the part of these children," Dr. Clark declares.

Historically American public schools have shown that even "normal children are taught efficiently without regard for the disadvantages of their parents, they have been able to use education as a means of overcoming economic disadvantage," Dr. Clark observes.

Only in the case of disadvantaged minority groups have educators argued that the schools were incapable of accomplishing this historic function.

The explanation for so many low-income, minority group youngsters failing to meet the usual academic standards in school, according to Dr. Clark, is simply ineffective teaching.

"These children are not being taught adequately in the classroom," he notes. "They are not taken seriously as human beings, as indicated by being held to normal standards. They are not perceived as human beings who are capable of meeting standards. They are being treated — for humanity or benevolence — as if they were unteachable. They are being subjected to special programs designed to reinforce and verify the biases of unteachability.

"One of the burdens of being a child of a minority group is that you have no way of proving yourself from an invidious programs," he continues.

What these youngsters need, [illegible] Dr. Clark, is for teachers to see "that most learning of importance in our society extends — to teach."

He urges that teachers not be certified until they have completed three to five years in the classroom, teaching under close supervision. He says a strict system of teacher accountability is essential for effective teaching. And he wants teachers to be paid on a basis not of longevity but of "demonstrated professional achievement."

Dr. Clark advocates a "rigorous, tough-minded, hard-nosed educational program with a single standard of academic expectation and performance." Such standards would restore to minority youngsters the feelings of competence and self-esteem they cannot develop knowing less is expected of them than of others. And competitiveness would improve their morale and performance just as it does in athletics.

Emphasizes Dr. Clark, "I am opposed to multiple standards, to multiple entrance requirements, to multiple approaches to work for a degree." They imply, he notes, either that blacks are biologically inferior or that the environmentally cultural deprivation theories are right and we will never be able "to deal with human beings without the irrelevance of color or race."

"I want these special programs and special commissions and special conditions and special dormitories and special remediations to be over tomorrow," he stresses.

"If the funds spent on these programs were used to strengthen a tough-minded educational system with a high degree of accountability, rigorous standards of curriculum and professional expectations, within a matter of two [illegible] three years, the results would be dramatically positive."

[illegible]